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THE ATTORNEY GENERAL OF WEST VIRGINIA**

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**MEDICAID ESTATE RECOVERY**  
**What Seniors Should Know**

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## **IMPORTANT DISCLAIMER**

The West Virginia Attorney General's Office does not administer Medicaid or Estate Recovery, but has prepared this information as a public service. This pamphlet is not designed as a substitute for legal advice, nor is it a comprehensive statement of the law. For instance, it does not discuss the so-called "TEFRA Lien program" that, if implemented, would allow the State to place liens against the homes of permanently institutionalized Medicaid recipients *before* their death. As of April of 2009, State Medicaid officials had not implemented such a lien program.

As to the impact of gifts on Medicaid eligibility, this pamphlet incorporates Federal statutory amendments passed on February 8, 2006, that dramatically limit the eligibility of persons who give away property or purchase annuities to reduce their assets. Gifts made prior to February 8, 2006 will remain subject to pre-existing rules, which were more flexible and are also described herein. Future changes in the law or policy cannot be predicted, and the statements herein are based solely on the laws and policies in force at the time of release. **Specific questions on how the law applies to you or your family should be directed to legal counsel.**

**Information Sources:** Sources used in preparation of this release include the Federal Estate Recovery statute (42 U.S.C. § 1396p), which may be found online at <http://mysite.verizon.net/shawn.majette/documents/DRA05-42p.pdf>; Federal guidelines concerning implementation of the 2006 amendments to the Estate Recovery statute (<http://www.cms.hhs.gov/smdl/downloads/TOAEnclosure.pdf>); the State Medicaid Manual (<http://www.cms.hhs.gov/Manuals>); West Virginia's "Income Maintenance Manual," Chapter 10, including its appendix, and Chapter 17 ([http://www.wvdhhr.org/bcf/family\\_assistance/policy.asp](http://www.wvdhhr.org/bcf/family_assistance/policy.asp)); and the State's Medicaid Regulations ([http://www.wvdhhr.org/bms/Manuals/Common\\_Chapters/bms\\_manuals\\_Chapter\\_900.pdf](http://www.wvdhhr.org/bms/Manuals/Common_Chapters/bms_manuals_Chapter_900.pdf)).

# **MEDICAID ESTATE RECOVERY**

## **What Seniors Should Know**

### **What is Estate Recovery?**

Estate Recovery is a collection program required by a Federal law (42 U.S.C. § 1396p). This law requires all States to “recover” money spent by Medicaid on “long-term care” (nursing-home or home and community-based care) by collecting it from the estates of people who received such care after reaching age 55. Most of the money collected goes to the Federal government, not the States. States that fail to implement Estate Recovery collections can be cut-off from Federal Medicaid funding, but no State has yet been penalized for failure to properly implement the Estate Recovery requirements.

✓ Estate Recovery does NOT create a debt owed by the deceased Medicaid-recipient’s heirs, but rather creates a claim or lien only against the assets in the deceased’s estate. The State Medicaid agency (called the “Bureau of Medical Services”) files a claim against the estate and can enforce it in the same manner as any other creditor of the estate.

✓ Many assets that were exempt for purposes of determining Medicaid eligibility (such as the home) are no longer exempt after the Medicaid-recipient dies, and are subject to Estate Recovery.

✓ The maximum amount of an Estate Recovery claim is the value of the estate, or the amount spent by Medicaid on long-term care after the deceased recipient reached age 55, whichever is less. If the assets in the estate are insufficient to pay the claim, the remainder of the claim is extinguished and does not constitute a debt.

✓ There are several circumstances, hereafter described, in which an estate recovery will not take place.

## **Whose estates are subject to Estate Recovery?**

Persons who received Medicaid funded nursing-home or “home and community-based care”<sup>1</sup> after reaching age 55 are subject to Estate Recovery for the cost of such care. *These are the only two programs to which Estate Recovery applies.*

Estate recovery does NOT apply to the “Community Care” program administered by Senior Centers (which is really the Medicaid Personal Care Program). Nor does it apply to the Lighthouse Program, which offers State-funded home-based services to some persons who cannot meet the disability standards required for Medicaid-funded care. Nor does it apply to care delivered by Home Health Agencies. Estate Recovery does NOT apply to MediCARE benefits, nor to any Medicaid benefits received prior to age 55.

## **What are Estate Recovery “hardship waivers?”**

In the circumstances listed below, the Medicaid agency will waive its claim against the estate:

1. The estate is worth less than \$5,000.00. (This is the number in the State’s regulations. Currently, however, West Virginia is not seeking recoveries from estates worth less than \$50,000.00. This may change at any moment.)
2. An adult son or daughter has lived in the home and provided care to the parent for at least two years prior to the date that the parent became a Medicaid recipient, and continued to reside in the home until the parent’s death;
3. An adult sibling of the Medicaid recipient has lived in the recipient’s home for at least one year prior to the date that the recipient was institutionalized, continued to reside in the home until the recipient’s death, and had a right to remain there after the recipient’s death;
4. The property in the estate is essential to a family business in which one

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<sup>1</sup>Home and community-based care is often called the “Title XIX Waiver Program,” or the “Aged and Disabled Waiver Program.”

or more heirs has been continuously employed for at least one year before the recipient first received Medicaid-funded services; or

5. Beneficiaries may also apply for a hardship waiver by showing that a recovery from the estate will “jeopardize the survival of the family unit or severely disrupt the family’s income or business.”

The letter to the administrator of the estate that announces Medicaid’s intent to file a claim includes information on how to request a hardship waiver.

### **When will estate recovery be delayed?**

Recovery from a Medicaid recipient’s estate will be made only after the death of the recipient’s surviving spouse, if any, and only when the recipient has no surviving son or daughter who is under age 21 or disabled. In the meantime, a lien may be placed on the real property in the estate.

### **What about property that is not in the estate?**

Only property that passes through probate is affected by Estate Recovery.

Often, real estate is owned “jointly with right of survivorship” and passes to the survivor “outside of probate.” If the Medicaid recipient is survived by the joint-owner (usually a spouse, sibling, son or daughter), such real estate is not subject to Estate Recovery.

Life insurance proceeds payable directly to a beneficiary are not subject to Estate Recovery. Life insurance proceeds are subject to recovery only if paid to the estate (which occurs when the beneficiaries of the policy predecease the recipient).

### **Will a lien be placed on my home while I am still alive?**

Not likely. Current regulations authorize the State medicaid agency (the Bureau of Medical Services) to place a lien on the home of “permanently institutionalized” persons receiving medicaid nursing home benefits. However, the agency has chosen not to do so.

### **What if the heirs paid for care to the recipient or upkeep to the home? Can they get their money back?**

Usually. An adult son, daughter, grandchild, or sibling who is an heir may usually retain from the estate any money that he or she contributed to the care of the recipient (prior to receiving Medicaid) and to the upkeep of the home. Documentation of the expenditures, such as receipts or affidavits, will be needed.

### **Can I Give My Property to Others in Order to Create Medicaid Eligibility or to Avoid Estate Recovery?**

Giving away property in hopes of creating eligibility for Medicaid-funded long-term care, or to avoid Estate Recovery, is *not* unlawful, but (with a few exceptions), giving property away *will* create a period of ineligibility during which Medicaid will not pay for your long-term care. This section summarizes the eligibility criteria for Medicaid-funded long term care, the consequences of giving property away, and then summarizes those gifts or transfers that do *not* have adverse consequences.

#### **General Rules of Medicaid Eligibility for Nursing Home or Community-based Long-term Care**

√ You must be so disabled as to require long-term nursing home or community-based care as determined by state's medical eligibility test (PAS-2000);

√ For nursing home eligibility, your “countable income” must be less than the a nursing home costs. Your spouse’s income isn’t counted. If you enter a nursing home, your spouse’s need to use your income will be considered when calculating the income available to you to fund your own care.

√ For community-based care, your “countable income” must be less than \$2,022/month<sup>2</sup>. Your spouse’s income isn’t counted.

√ Your “non-exempt” assets must be worth \$2,000.00 or less. Your spouse’s assets *are* considered in this calculation. However, your spouse is allowed to retain the first \$21,912 in non-exempt marital assets, or one-half of all non-exempt marital assets up to \$109,560 (½ of \$219,120), whichever is greater. Thus, if you and your spouse’s combined non-exempt assets are \$23,912 or less, you could be immediately eligible for Medicaid. If they are worth more, you will have to spend your half of the excess before you can qualify for Medicaid.

### **Some Exempt Assets**

Certain assets are not considered to be available to you or your spouse in determining your eligibility for Medicaid. For instance, burial plots and irrevocable funeral contracts are not counted, nor are they subject to Estate Recovery. The home is not counted in determining your eligibility unless it is worth more than a half million dollars (\$500,000), but it *is* subject to estate recovery. Similarly, the following assets are not counted in determining eligibility, but they **ARE** subject to Estate Recovery if you own them when you die. These include:

√ Your car;

√ Household goods and personal effects;

√ Trade or business or other income-producing property in current use as such;

√ Retirement accounts that cannot be withdrawn in a lump sum.

As earlier noted, estate recoveries will not be pursued until the death of any surviving spouse or disabled child, nor until your non-disabled children have all reached age 21.

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<sup>2</sup>This number, and other financial eligibility criteria, change each year.

### **What are the Consequences of Giving My Property Away?**

If you or your spouse give away property, including your home, during the 60 month period prior to applying for Medicaid-funded long term care, Medicaid will calculate a period of ineligibility during which you may not receive Medicaid benefits. If such a transfer or gift is made, the period of ineligibility, or “penalty period,” is a number of months that is calculated by dividing the value of the property transferred by \$5,087. The penalty period starts on the date that you would otherwise have been eligible for, and receiving services under, Medicaid. For instance, if you or your spouse transfer your home to your children and, within five years thereafter, one of you applies for Medicaid-funded long-term care, there will be a penalty period during which you will not be permitted to use Medicaid funding. If your house was worth \$100,000, the penalty period would be about 20 months, and wouldn’t even start until all your other assets had been spent down sufficiently to qualify for Medicaid.<sup>3</sup>

***Hardship Waiver:*** The penalty period will *not* be enforced, however, if so doing would deprive the individual (A) of medical care such that the individual's health or life would be endangered; or (B) of food, clothing, shelter, or other necessities of life.

### **Exempt Transfers**

The following types of transfers (including certain gifts) do not result in a period of ineligibility:

- √ Any transfer in which you intended to get fair market value;
- √ A transfer that you can establish was made exclusively for a purpose other

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<sup>3</sup>The above discussion is based on the new Federal statute that was passed in February of 2006. Gifts made prior to February of 2006 are subject to the old statute, and cause a penalty period only if the gift was made within the 36 months preceding the Medicaid application. Thus, if you applied for Medicaid-funded long-term care after February of 2009, gifts made prior to February of 2006 do NOT cause any penalty. If you applied for Medicaid before February of 2009, any gift made prior to February of 2006 that is less than 36 months old when you applied for Medicaid will create a penalty period, but the penalty period started on the date of the gift, and may have already expired by the time you applied for Medicaid.



than to qualify for medical assistance;

√ Any transfer to your spouse;

√ A transfer to certain trusts for the sole benefit of a spouse or a blind or disabled child;

√ Any transfer of an exempt asset (such as an automobile or household furnishings), *other than the home*; or

√ Any transfer where the property you gave away is returned to you. This exemption can be useful to shorten a penalty period, because the partial return of a gift causes a corresponding reduction in the penalty period, and the money returned can be used to pay your nursing home bills in the meantime. Careful planning can result in funding your nursing home care throughout the entirety of the shortened penalty period using returned gifts, while still allowing the recipient of the gifts to keep a substantial portion of them.

### **Exempt Transfers of the Home**

The home may be transferred without penalty only if transferred to:

√ A spouse;

√ A son or daughter who is blind or disabled or under age 21;

√ A son or daughter who has lived in the home for at least two years prior to the applicant's institutionalization, and who provided care to the applicant; or

√ A sibling who has resided in the home for at least one year prior to the applicant's institutionalization, and who can claim a right to remain there based on an agreement or understanding or an equity-interest in the home.

### **Things to discuss with your lawyer before entering a nursing home or**

## **accepting medicaid-funded home and community-based care.**

A lawyer's advice is critical if it appears that you (or a family member) will require long-term care. Find one that specializes in "elder law," including estate planning.

**Ask your lawyer** about the following commonly suggested strategies:

√ If you are single, and want to ensure that your home goes to your heirs, you may be advised to convey it to them by a deed in which you retain a "life estate;" or you may be advised to execute a deed to yourself and your heirs as "joint tenants with right of survivorship." While such a transfer will result in a penalty period during which you cannot receive Medicaid benefits, that period will be much shorter than if you simply conveyed your entire interest in the home. **You should obtain a lawyer's advice to determine the best method for you.**

√ If you are married, think about giving your share of your home and any other exempt assets to your spouse so they won't end up in your estate.

√ **With the assistance of a lawyer**, you may wish to consider purchasing an annuity for you or your spouse. However, there are complex rules that limit the kinds of annuities you can buy for this purpose, and that require the annuity to meet certain requirements. That is why you should consult a lawyer before buying an annuity.

√ **After** you have entered a nursing facility, and **after** your Medicaid eligibility has been determined, your spouse may give his or her interest in the home to others without affecting your eligibility. Indeed, **after** your Medicaid eligibility has been determined, you may transfer your share of the home to your spouse, who may then give it to your heirs. While this will have no impact on *your* entitlement to Medicaid, it will create a period of ineligibility for your spouse. **If, however, the home is given to your heirs *before* your eligibility for Medicaid is determined, the transfer *will* cause a penalty period.**

√ The at-home spouse should think about changing his or her **will and life insurance policies**, so the institutionalized spouse won't inherit assets that would then have to be 'spent down.'

√ Make sure your **life insurance** beneficiaries are likely to outlive you. (If your sole beneficiary is your spouse, who predeceases you, the proceeds of your policy will end up in your estate and be subject to Estate Recovery.)

√ During "spend down" (the period when you are depleting your own assets so as to become eligible for Medicaid), you may **reduce your countable assets** by buying "exempt assets"(i.e., assets that are not considered in determining eligibility for Medicaid), such as home furnishings or improvements, a burial plot and pre-need funeral contract, or a car, all without affecting Medicaid eligibility.

√ Whether married or not, there may be other legal methods available to you to allow some of your life-savings to remain in your family, but the law in this area changes frequently, and this pamphlet does not attempt an exhaustive list of such methods.

### **What are the problems caused by Estate Recovery?**

**Estate Recovery is discriminatory**, because it applies only to persons over age 55 receiving long-term care. Further, it effectively penalizes only non-wealthy homeowners. These are hard-working responsible taxpayers who have already "payed their dues" in the form of income taxes, Medicare premiums, social security tax, and, in most cases, military or volunteer service to their communities. These are the people who are responsible for our moral fiber, economic success, and military strength. In their final years, they should be receiving a big "Thank you!" from the Government. Instead, Estate Recovery visits a demeaning insult upon them, and sends the wrong message to their families about the value of hard work and responsible citizenship.

**Estate Recovery provides only minuscule revenues.** Nationwide, less than 1% of the cost of providing long-term care is recovered via the Estate Recovery program. Most of that goes to the Federal government, not the States, but it is the States that must collect it.

**Estate Recovery is a barrier to care.** People who need long-term care often decline such services for fear of losing their home after they die. They and their families are faced with very difficult choices. Without Medicaid long-term care benefits, they may require repeated hospitalizations, won't be able to get proper medications, will be unable to take care of themselves or their home, and may feel they are a burden to their loved ones.

**Estate Recovery is humiliating.** People who have no choice but to accept Medicaid-funded care are often severely depressed by the prospect of Estate Recovery, and humiliated that their inability to care for themselves in the last years of an otherwise productive life may result in the loss of their home. Such people often become isolated from their family because they think that they've let their loved ones down.

Heirs who were depending on, and often earned, their inheritance are surprised by Estate Recovery, and angry that the State is taking a home that is so important to their family but of inconsequential value to the government.

### **What can I do to eliminate Estate Recovery?**

Although Estate Recovery is administered by State officials, it is governed by Federal law. Write to your congressmen and tell them about the "problems" listed above as they impact upon you or your loved ones. The Members of Congress are:

The Honorable Robert C. Byrd  
United States Senate  
311 Hart Senate Office Building  
Washington, D.C. 20510  
(202) 224-3954

The Honorable John D. Rockefeller, IV  
United States Senate  
109 Hart Senate Office Building  
Washington, D.C. 20510  
(202) 224-6472

The Honorable Alan B. Mollohan  
U.S. House of Representatives  
2242 Rayburn House Office Building  
Washington, D.C. 20515  
(202) 225-4172

The Honorable Nick J. Rahall, Jr.  
U.S. House of Representatives  
2307 Rayburn House Office Building  
Washington, D.C. 20515  
(202) 225-3452

The Honorable Shelly Moore Capito  
U.S. House of Representatives  
1431 Longworth House Office Building  
Washington, D.C. 20515  
(202) 225-2711

## **Who can I call if I have questions about Medicaid or Estate Recovery?**

You may call Silas Taylor at the Attorney General's Office at 304-558-2021 with your questions about this pamphlet, but he cannot represent you or provide you with legal advice.

The State Ombudsman program provides valuable information and advocacy to residents of long-term care facilities, or to persons considering placement in such a facility (or their families), about all aspects of long-term care, including Medicaid-related issues. They have nine regional offices in West Virginia:

### **State Ombudsman**

West Virginia Bureau of Senior Services  
1900 Kanawha Boulevard East  
Charleston, WV 25305  
877-987-3646 (toll-free); 304-558-3317  
or 304 363-1595  
e-mail: [info@wvseniorservices.gov](mailto:info@wvseniorservices.gov)

### **Regional Ombudsmen**

Legal Aid of West Virginia  
922 Quarrier Street, Suite 400  
Charleston, WV 25301  
800-834-0598 (toll-free); 304  
343-4481

Health Management Systems, Inc. [304-342-1604], has a contract with the State of West Virginia to implement the Estate Recovery program (i.e., to identify estates subject to recovery and attempt collection), and also has the job of answering questions about the mechanics of Estate Recovery.

Connie Ward [304-558-1782] at West Virginia's Bureau of Medical Services oversees the Estate Recovery program in West Virginia. She can assist in explaining how to obtain a "hardship waiver" or how to challenge unreasonable actions of Health Management Systems, Inc.

For questions about eligibility and asset transfers, you may talk to your local office of the West Virginia Department of Health and Human Resources, Terry Cunningham, a church-affiliated social worker [304-744-7634], or the State Ombudsman program (contact information above).

Seek legal advice to determine how these provisions apply to your specific circumstances. There are several attorneys in West Virginia who specialize in such matters.